

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PATRICK J. O'DEA, JR.,	:	DETERMINATION
OFFICER OF P.O.E., INC.	:	DTA NO. 816401
	:	
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1991 through May 31, 1994.	:	

Petitioner, Patrick J. O'Dea, Jr., 753 South Broadway, Hicksville, New York 11801, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1991 through May 31, 1994.

On April 7 and 9, 1999, respectively, petitioner by his representative, Joel A. Goldman, CPA, and the Division of Taxation by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by July 22, 1999, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined the sales and use tax liability of P.O.E., Inc.

FINDINGS OF FACT

1. On September 28, 1995, the Division of Taxation (“Division”) issued to petitioner a Notice of Determination (assessment identification number L-011083780) assessing additional sales tax due for the period June 1, 1991 through May 31, 1994 in the amount of \$254,477.26, plus penalty and interest. The notice stated that it was being issued to petitioner because he was liable as an officer or responsible person of P.O.E., Inc. (“POE”) for taxes determined to be due in accordance with Tax Law § 1138(a); § 1131(1) and § 1133(a).

2. P.O.E., Inc., d/b/a/ Freeman Windows and Doors, was a wholesale distributor of windows, doors and coil and had been incorporated in June 1991. During the audit period the corporation was located at 755 South Broadway, Hicksville, New York. Mr. O’Dea was the president and secretary of the corporation and 100% shareholder. Mr. O’Dea had set up the corporation to purchase Freeman’s Windows, Inc., a separate corporation from his own, in June 1991. However, the sale was not completed until December 1993.

3. The Division began the audit by mailing to P.O.E., Inc. a standard form audit appointment letter dated July 27, 1994. In addition to setting a date and time for the first meeting between the corporation and the Division's auditor, this letter specifically requested that P.O.E., Inc. make available at the time of the first meeting all books and records pertaining to its sales tax liability for the period under review. The letter indicated that the period under review was June 1991 through May 1994. In the letter and attached document, the Division requested that the corporation make available for the auditor all journals, ledgers, sales invoices, purchase invoices, expense purchase invoices, cash register tapes, Federal income tax returns, exemption certificates and bank statements maintained for the audit period. Additional requests for records

were made on September 22, 1994, October 6, 1994, October 20, 1994, November 29, 1994 and February 7, 1995.

4. On December 2, 1994, the auditor received business checking account statements from Chemical Bank relating to an account held by the corporation. Mr. O'Dea's was the only authorized signature on the commercial signature card held by Chemical Bank. The business statements covered the period December 3, 1993 through June 13, 1994.

5. POE failed to provide any additional documentation to the auditor, including original source documents such as purchase invoices, sales invoices or exempt certificates. Due to the lack of records, the auditor decided to estimate sales on the basis of external indices, specifically on the business checking account statements, which were the only records available.

6. The auditor transcribed the bank deposits for the final two quarters of the audit period from the Chemical Bank statements. The amount of deposits for the quarters ended February 28, 1994 and May 31, 1994 was \$279,296.91. All the deposits were held to be taxable due to the failure of POE to provide any documentation of nontaxable transactions. The earlier periods at issue under audit were assessed the same amounts as had been determined to be due from Freeman's Windows, Inc. as a result of a separate audit. However, when it became apparent to the Division that POE did not begin doing business until December 1993, it canceled all the periods assessed except the quarters ended February 28, 1994 and May 31, 1994. The Division also reduced the sales tax due for the quarter ended February 28, 1994 to \$5,172.82 and reduced the sales tax due for the quarter ended May 31, 1994 to \$16,576.08.

CONCLUSIONS OF LAW

A. Every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division of Taxation's estimating tax due (Tax Law § 1138[a]). To determine the adequacy of a taxpayer's records, the Division of Taxation must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, 828, *lv denied* 71 NY2d 806, 530 NYS2d 109; *Matter of King Crab Rest. v. State Tax Commn.*, 134 AD2d 51, 522 NYS2d 978, 980). The purpose of such an examination is to determine whether the records are so insufficient as to make it "virtually impossible to verify taxable sales receipts and conduct a complete audit" (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division must adopt an audit method that will reasonably calculate the amount of taxes due (*see, Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, 157, *cert denied* 355 US 869). Whether the audit method used was reasonably calculated to reflect the taxes due can only be determined based on information made available to the auditor before the assessment is issued (*Matter of Queens Discount Appliances*, Tax Appeals Tribunal, December 30, 1993; *Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679, 681; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 453).

B. As the Tax Appeals Tribunal held in *Matter of Atlantic & Hudson Ltd.*

Partnership (January 30, 1992):

[a]lthough a determination of tax must have a rational basis in order to be sustained upon review (*see, Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see, Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *confirmed Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398).

Where, as here, petitioner has failed to introduce any evidence to rebut the presumption of correctness, the issuance of the assessment provides the rational basis for the assessment. To hold otherwise would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment (*see, Matter of A & J Gifts Shop v. Chu*, 145 AD2d 877, 536 NYS2d 209, *lv denied* 74 NY2d 603, 542 NYS2d 518; *Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) and that the petitioner has a heavy burden to prove the assessment erroneous (*see, Matter of Executive Land Corp. v. Chu*, 150 AD2d 7, 545 NYS2d 354, *appeal dismissed* 75 NY2d 946, 555 NYS2d 692).

In that petitioner did not submit any evidence in support of its petition, petitioner has "surrendered to the statutory presumption of correctness" and the subject assessments must be sustained (*see, Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174, 175). For the record, it is noted that the audit herein is facially sound (*see, Matter of Sol Wahba, Inc. v. State Tax Commn.*, 127 AD2d 943, 512 NYS2d 542).

C. The petition of Patrick J. O'Dea, Jr., officer of P.O.E., Inc., is granted to the extent indicated in Finding of Fact "6", but in all other respects is denied, and the notice of determination dated September 28, 1995, as modified, is sustained.

DATED: Troy, New York
December 2, 1999

/s/ Thomas S. Sacca
ADMINISTRATIVE LAW JUDGE